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IN THE SUPREME COURT OF THE STATE OF IDAHO

HARVEY L. MAHLER,)	
)	NO. 40963
Petitioner-Appellant,)	
)	PAYETTE COUNTY NO. CV 2012-267
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF PAYETTE

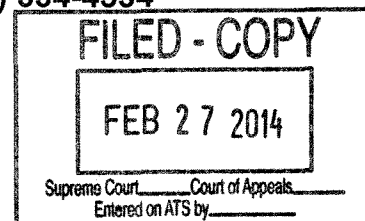
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STATEMENT OF THE CASE

Nature of the Case

Harvey L. Mahler appeals from the district court's order summarily dismissing his petition for post-conviction. Mr. Mahler asserts that he raised a genuine issue of material fact as to whether his mental illness prevented him from timely filing his petition and, therefore, the district court erred by summarily dismissing the petition as untimely.

Statement of the Facts and Course of Proceedings

In 2010, Mr. Mahler pleaded guilty to lewd conduct with a minor and the district court imposed a unified sentence of eighteen years, with six years fixed. (R., p.8.) He did not appeal. (R., p.9.)

On March 19, 2012, Mr. Mahler filed a petition for post-conviction relief, asserting that he received ineffective assistance of counsel and that he was denied a trial because of a lack of funds in Payette County. (R., p.9.) He alleged that counsel denied his request to go to trial due to a lack of funds and failed to advise him of his appellate or Idaho Criminal Rule 35 (*hereinafter*, Rule 35) rights. (R., p.10.) In a supporting affidavit, Mr. Mahler asserted that his appointed attorney took advantage of his mental illness in order to save the county money. (R., p.13.) Further, he requested a trial many times, and counsel told him that "everyone with your crime needs to go to prison." (R., p.13.) Mr. Mahler asserted that counsel failed to obtain any physical evidence or conduct a pretrial investigation. (R., p.14.) He also asserted that counsel failed to provide him a copy of the PSI for his review. (R., p.14.)

The State answered, asserting, among other things, that the petition was untimely. (R., p.19.) The State then filed a motion for summary disposition on the basis that the petition was untimely. (Augmentation.) The State asserted that the statute of limitation expired on October 29, 2011, and that the petition was not filed until March 19, 2012. (Augmentation.) Mr. Mahler responded, asserting that he suffered from bad health and brain trauma. (R., p.28.) Additionally, he asserted that his trial attorney never discussed his appellate rights and that it was only after another inmate assisted him that he understood any of the deadlines. (R., pp.29-30)

The district court then filed a notice of intent to dismiss on the basis that the petition was untimely. (Augmentation.) Mr. Mahler objected to the notice, asserting that the statute of limitation should be tolled due to mental illness. (Augmentation.) He then submitted affidavits of himself and Rick Caldwell. (Augmentation.) In his affidavit, Mr. Mahler stated that he suffered from head traumas in the past and had brain damage; as a result he remembered very little from the hearings in his criminal case and did not remember the time limit for filing a petition for post-conviction relief. (Augmentation.)

Mr. Caldwell met Mr. Mahler in 2010, when they were both in RDU. (Augmentation.) They became reacquainted in 2011. (Augmentation.) In 2010 and 2011, Mr. Mahler, "could barely talk and hardly write his own name." (Augmentation.) It was not until Mr. Mahler enrolled in classes in 2011, that his speech and writing ability began to improve. (Augmentation.) When Mr. Caldwell talked to Mr. Mahler, he had no understanding of what "Rule 35, appeal, or post-conviction" meant. (Augmentation.) At the time of the November, 2012 affidavit, "Mr. Mahler's understanding is better now that

he has re-learned to talk and write, but he still struggles. His memory/recall is almost zero.” (Augmentation.) Based on this, Mr. Caldwell did not believe that Mr. Mahler understood the requirements for filing a petition for post-conviction relief. (Augmentation.)

After a hearing, the district court summarily dismissed the petition on the basis that it was untimely. (R., p.53; 12/20/12 Tr., p.21, Ls.4-10.) Mr. Mahler appealed. (R., p.56.) He asserts that the district court erred by summarily dismissing the petition because he raised a genuine issue of material fact as to whether his mental illness prevented him from timely filing his petition.

ISSUE

Did the district court err by summarily dismissing Mr. Mahler's petition for post-conviction relief?

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. Mahler's Petition For Post-Conviction Relief

A. Introduction

Mr. Mahler asserts that the district court erred by summarily dismissing his petition for post-conviction relief because he raised a genuine issue of material fact as to whether his mental illness prevented him from timely filing his petition.

B. The District Court Erred By Summarily Dismissing The Petition

A post-conviction petition initiates a proceeding that is civil, rather than criminal, in nature; and like the plaintiff in a civil action, the applicant must prove his or her allegations upon which the requests for relief are based by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008). But, unlike a plaintiff in other civil cases, the original post-conviction petition must allege more than merely “a short and plain statement of the claim.” *Id.* at 443-444. Rather, the application must present or be accompanied by admissible evidence supporting the allegations contained therein, or else the post-conviction petition may be subject to dismissal. *Id.* In addition, the post-conviction petition must set forth with specificity the legal grounds upon which the application is based. *Ridgley v. State*, 148 Idaho 671, 675 (2010).

A district court may summarily dismiss a post-conviction petition only where the petition, and evidence supporting the petition, fails to raise a genuine issue of material fact that, if resolved in the petitioner's favor, would entitle him or her to the relief requested. *Yakovac*, 145 Idaho at 444. Summary dismissal of a petition for post-conviction relief is the procedural equivalent of summary judgment under I.R.C.P. 56.

Knutsen v. State, 144 Idaho 433, 437-438 (Ct. App. 2007). The United States Supreme Court has defined the standard for whether there exists a genuine issue of material fact as whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved in favor of either party.” *Id.* at 250. If a genuine factual issue is presented, an evidentiary hearing must be conducted. *Yakovac*, 145 Idaho at 444.

The underlying facts alleged by the petitioner “must be regarded as true” for purposes of summary dismissal. *Rhoades v. State*, 148 Idaho 247, 250 (2009). Any disputed facts are construed in favor of the non-moving party, and “all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009). The standards of review for the petitioner’s underlying post-conviction claims also apply to “questions regarding the accrual of actions and the passage of the statute of limitations,” including questions regarding the equitable tolling of the statute of limitations. *Rhoades*, 148 Idaho at 250.

Additionally, this Court reviews the district court’s determination and construction of the statute of limitations for a post-conviction petition *de novo*. *State v. Martinez*, 130 Idaho 530, 532 (Ct. App. 1997). Idaho courts have recognized equitable tolling of the statute of limitations for post-conviction proceedings where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents him from earlier pursuing challenges to his conviction. *Sayas v. State*, 139 Idaho 957, 959 (Ct. App. 2003). To toll the statute of limitations on account of mental illness or medication, a

petitioner must show that he suffered from a serious mental illness which rendered him incompetent to understand his legal right to bring an action within a year or otherwise rendered him incapable of taking necessary steps to pursue that right. *Chico-Rodriguez v. State*, 141 Idaho 579, 582 (Ct. App. 2005). “It is not enough to show that compliance was simply made more difficult on account of a mental condition.” *Id.* Equitable tolling only applies to the period the petitioner’s mental illness actually prevented him from filing the post-conviction petition. *Id.* A district court’s determination as to the severity of the mental condition and whether it satisfies the requirements for tolling is a factual determination reviewed under the applicable standard for the procedural posture of the appeal. *See id.*

As is set forth above, Mr. Mahler submitted affidavits of himself and Rick Caldwell. (Augmentation.) In his affidavit, Mr. Mahler stated that he suffered from head traumas in the past and had brain damage; as a result he remembered very little from the hearings in his criminal case and did not remember the time limit for filing a petition for post-conviction relief. (Augmentation.)

Mr. Caldwell met Mr. Mahler in 2010, when they were both in RDU. (Augmentation.) They became reacquainted in 2011. (Augmentation.) In 2010 and 2011, Mr. Mahler, “could barely talk and hardly write his own name.” (Augmentation.) It was not until Mr. Mahler enrolled in classes in 2011, that his speech and writing ability began to improve. (Augmentation.) When Mr. Caldwell talked to Mr. Mahler, he had no understanding of what “Rule 35, appeal, or post-conviction” meant. (Augmentation.) At the time of the November, 2012 affidavit, “Mr. Mahler’s understanding is better now that he has re-learned to talk and write, but he still struggles. His memory/recall is almost

zero.” (Augmentation.) Based on this, Mr. Caldwell did not believe that Mr. Mahler understood the requirements for filing a petition for post-conviction relief. (Augmentation.)

In addition to the affidavits, the district court took judicial notice of the competency hearings in the underlying criminal case. (12/20/12 Tr., p.13, Ls.4-15.) These hearings reveal that on January 15, 2010, Mr. Mahler was found incompetent to stand trial. (1/15/10 Tr., p.6, Ls.18-24.) At the subsequent hearing on April 16, 2010, Mr. Mahler was found competent. (4/16/10 Tr., p.25, Ls.3-10.) Susan Stumph, a clinical psychologist with the Department of Health and Welfare, testified that Mr. Mahler had a full scale IQ of 74, a verbal IQ of 71, and a performance IQ of 81. (4/16/10 Tr., p.11, Ls.21-24.) She considered a verbal IQ of 71 to be “borderline” with regard to the ability to assist in one’s defense. (4/16/10 Tr., p.12, Ls.16-22.) At the entry of plea hearing, Mr. Mahler indicated that he made it to the ninth grade in school and could not read. (6/17/10 Tr., p.9, Ls.11-15.)

The district court summarily dismissed the petition on the basis that the information submitted by Mr. Mahler and taken judicial notice of by the court demonstrated only that Mr. Mahler, “just didn’t understand [the post-conviction procedure] until somebody explained it to him for a period of time.” (12/20/12 Tr., p.20, Ls.19-20.) However, the court noted that, “there’s a legitimate issue here. I just, you can see I actually made this final thing sitting here. When I got down to it last night, it could go either way . . .” (12/20/12 Tr., p.21, Ls.11-16.)

Mr. Mahler respectfully disagrees with the district court’s conclusion that the evidence shows only that Mr. Mahler did not understand the post-conviction procedure

until it was explained to him. In his affidavit, Mr. Mahler stated that he suffered from head traumas in the past and had brain damage. (Augmentation.) The social/sexual assessment from the underlying criminal case indicated that Mr. Mahler suffered from a head injury due to a farm accident that he had memory problems as a result. (Social/Sexual Assessment, p.4.) Mr. Mahler also told the presentence investigator that he had a injury and had received counseling as a result. (Presentence Investigation Report, p.10.)

Mr. Caldwell averred that in 2010 and 2011, the relevant time period,¹ Mr. Mahler, “could barely talk and hardly write his own name.” (Augmentation.) It was not until Mr. Mahler enrolled in classes in 2011, that his speech and writing ability began to improve. (Augmentation.) Thus, the evidence submitted indicated not just that Mr. Mahler did not understand the post-conviction procedure, he would have been *incapable* of filing a petition – a person who can barely speak or write their name could not prepare a petition for post-conviction relief. Further, Mr. Mahler had almost no memory, and a person with no memory could hardly be expected to be able to formulate grounds for relief in a petition.

Evidence that Mr. Mahler complained about a head injury can be found throughout the underlying criminal case; it cannot be said he conjured up a mental illness in the post-conviction case simply to excuse the statute of limitation. The effects from this injury were documented by a fellow inmate and sworn to in an affidavit. Even

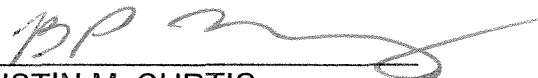
¹ The district court concluded that Mr. Mahler was sentenced on September 17, 2010 and the judgment was filed on September 22, 2010. Further, the court determined that November 3, 2010 was the time period for filing the appeal and that the statute of limitation lapsed on November 3, 2011. (12/20/12 Tr., p.11, L.21 – p.12, L.7.)

when he was determined to be competent, Mr. Mahler was on the "borderline." Mr. Mahler could barely speak or write during the time period the statute of limitation was running. Mr. Mahler's difficulty was not simply failing to understand his post-conviction rights (though there is certainly evidence that this was the case); he was incapable, due to his head injury, of preparing his petition. The district court, therefore, erred in summarily dismissing the petition because it was untimely.

CONCLUSION

Mr. Mahler requests that the district court's order summarily dismissing his petition for post-conviction relief be reversed and case remanded for further proceedings.

DATED this 27th day of February, 2014.


for JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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ICC
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